



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 539 OF 2007

STEPHEN KIAMA KIGANO.....1ST PLAINTIFF

PENELOPE WENDY KIGANO2ND PLAINTIFF

VERSUS

ZEVERCHAND RAMJI SHAH.....1ST DEFENDANT

BEDANS AUCTIONEERING SERVICES2ND DEFENDANT

KISAUNI PROPERTIES LIMITED3RD DEFENDANT

REGISTRAR OF TITLES, LAND REGISTRY, NAIROBI.....4TH DEFENDANT

OFFICIAL RECEIVER & LIQUIDATOR OF

CONTINENTAL CREDIT FINANCE LIMITED5TH DEFENDANT

RULING

1. This is the plaintiffs' notice of motion dated 20th January 2012. The plaintiffs seek to review or set aside the order of court of 16th January 2012. That order had varied the earlier injunction of the court granted on 8th December 2010. The application is expressed to be brought under order 45 (1) (a) of the Civil Procedure Rules 2010 and sections 1A, 1B, 3A and 80 of the Civil Procedure Act.

2. There are two affidavits in support sworn by Stephen Kigano on 20th January 2012 and 1st February 2012. On 8th December 2010, the court first granted the plaintiff an injunction restraining the defendants from selling or dealing with the whole of L.R No 4242/3 pending hearing of the suit. The defendants were aggrieved and filed an application under order 40 rule 7 of the Civil Procedure Rules to vary the order. The variation was to ring fence the portion conveyed to the plaintiff and to restrict the injunctive relief to that extent. On 16th January 2012 the court varied the order in the following terms;

“That the defendants, their servants, agents or otherwise howsoever be and are hereby restrained jointly and severally from selling, trespassing on, disposing, advertising for sale and/or in any way from dealing adversely with a portion of LR NO. 4242/3 measuring 0.2277 Ha. or thereabouts and on which there is erected a house occupied by the plaintiffs pending the hearing and determination of the suit”.

3. The plaintiffs now pray for review of that order. The principal grounds are that there has been discovery of new and important evidence from the Survey of Kenya. This consists of an approved subdivision plan for L.R. No 4242/3 dated 21st November 1995 which shows that the plaintiffs bought two plots numbered 48 and 49 and measuring 0.2939 Ha and 0.2806 Ha. respectively. The plaintiff's portion is thus a larger area of 0.5745 Ha. and to encompass all developments thereon extending to a servant's quarters and a coffee mill. The plaintiffs say that the defendants concealed this fact from the court. The plaintiffs state they paid for the two plots and have had quiet possession until the year 2007 when the 1st defendant trespassed on their land. They say they have been paying rates and outgoings for the plot. Accordingly, the order of court of 16th January 2012 was erroneous by restricting the injunction to a smaller portion and should be reviewed.

4. The application is opposed by the defendants. There is filed a replying affidavit of Milton Imanyara sworn on 30th January 2012. There is also a replying affidavit of Patrick Kanyuira sworn on 10th February 2012. The gist of those depositions is that the plaintiffs bought only one plot under the sale agreement; that there are no new and important matters or evidence; that the plaintiffs have not established grounds for review; and that the net effect of the review orders sought would be to encumber the entire parcel of land known as LR No 4242/3.

5. I take the following view of the matter. There is a subdivision plan dated 8th March 1986 and made by J.M. Gatome licenced surveyor. The plaintiffs say they discovered in January 2012 another subsequent approved subdivision dated 21st November 1995 which has never been disclosed to them and which suddenly grants them two plots Nos 48 and 49 totalling 0.5745 Ha. This, on the face of it, would contradict the agreement of sale and the plaintiff's amended plaint. That amended plaint as well as the agreement for sale state that the "property sold is the subdivision of L.R No 4242/3 on which is created a house together with the improvements thereon". There is also an earlier deposition by Stephen Kigano in High Court Civil case No 3462 of 1995 in which the deponent was an interested party. In it, the applicants had deponed that they bought a portion measuring 0.2277 hectares on which they lived. That affidavit is annexed to the affidavit of Patrick Kanyuira marked PKT 1. It is not denied by the plaintiffs. At paragraphs 2,3,4 and 5 is deponed as follows;

"2. THAT by an agreement of sale dated the 30th day of April, 1986 made between myself and my wife aforesaid of the one part and the second defendant of the other, we purchased a sub-division of L.R. No.4242/3 on which is built a house together with all the improvements thereon, for a consideration of Kshs 600,000. Annexed hereto and marked "SKK1" is a true copy of the sale agreement.

3. THAT the sale agreement was duly signed by one Philip Wahome on behalf of Continental Credit Finance Limited as the authorized Attorney.

4. THAT on 6th May, 1986 and on 24th July, 1986, I paid Kshs.60,000/- and Kshs.40,000/- respectively towards purchase of the said property pursuant to the terms of the sale agreement. Annexed hereto and marked "SKK2" are true copies of the receipts issued to me and my wife.

5. THAT immediately after signing of the sale agreement, we occupied the house constructed on a portion of the suit property which is 0.2277 hectares and has since then lived on the said property".

6. I am of the view that these contested positions can only be

determined on full and tested evidence at the trial. The present application to review the order of court of 16th January 2012 that had in turn reviewed the order of court of 8th December 2010 will only engender further confusion. But I am also of the view that the plaintiffs are revising the terms of the sale agreement. The survey map they discovered is dated 23rd June 1982. This suit dates back to year 2007. The other suit I referred to being High court case No 3462 of 1995 dates back to the year 1995. I hold the view that if the plaintiffs had exercised due diligence, they would have accessed that survey map which is a public document. The law, unfortunately, is not on the plaintiff's side. I will turn briefly to the relevant law.

6. Section 80 of the Civil Procedure Act reads as follows;

Any person who considers himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

7. Order 45 rule 1(1) is pari materia with section 80 and provides;

1. (1) *Any person considering himself aggrieved –*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important mater or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

8. From a plain and natural meaning of the words of the law, an application for review is open to a person aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay; it must be on the basis of either new and important evidence not available at the time of trial; or on account of mistake or error on the face of the record; or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including Origo & another Vs Mungala [2005] 2 KLR 307, Kisya Investments Ltd Vs Attorney General and another Civil Appeal No 31 of 1995 (unreported), Refrigeration Contractors Ltd Vs Lieta [2005] KLR 506, Kuria Vs Shah [1990] KLR 316 and M'Anthaka M'Mwoga vs M'Boore [2006] eKLR.

9. I am unable to say that the approved subdivision plan dated 21st November 1995 is evidence which the plaintiff, exercising due diligence, would have been unable to find at the time of the suit or the ruling sought to be reviewed. I am not saying it is not important evidence. I am saying the facts disclosed do not rise to the threshold for review under section 80 of the Act or order 45 of the Rules. In the result, no sufficient cause for review has been established. The authorities I have cited point me clearly in the opposite direction. In the circumstances, I am unable to exercise my discretion in favour of the plaintiff.

10. In the result, the plaintiffs' notice of motion dated 20th January 2012 is hereby dismissed with costs to the respondents.

It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of April 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs.

No appearance for the 1st Defendant.

Ms Gitau for the 5th Defendant.